

1 Eric H. Gibbs (State Bar No. 178658)
ehg@girardgibbs.com

2 **GIRARD GIBBS LLP**

3 601 California Street, Suite 1400

4 San Francisco, California 94108

5 Telephone: (415) 981-4800

6 Facsimile: (415) 981-4846

7 Todd M. Schneider (State Bar No. 158253)

8 tschneider@schneiderwallace.com

9 **SCHNEIDER WALLACE COTTRELL**

10 **BRAYTON KONECKY LLP**

11 180 Montgomery Street, Suite 2000

12 San Francisco, CA 94104

13 Telephone: (415) 421-7100

14 Facsimile: (415) 421-7105

15 TTY: (415) 421-1655

16 Attorneys for Individual and Representative

17 Plaintiffs Kevin Dwaine Mitchell and Natasha Lytle

18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA**

20 KEVIN DWAIN MITCHELL and
21 NATASHA LYTLE, on behalf of
22 themselves and all others similarly situated,

23 Plaintiffs,

24 v.

25 ACOSTA SALES, LLC, f/k/a ACOSTA
26 SALES CO., INC. d/b/a ACOSTA SALES
27 AND MARKETING COMPANY, A
28 Delaware limited liability corporation,
ACOSTA, INC., a Delaware corporation,
and DOES 1-10.

Defendants.

Case No. **CV11-01796** MPP(DPX)

COLLECTIVE AND CLASS ACTION

COMPLAINT FOR VIOLATIONS
OF:

(1) FAIR LABOR STANDARDS
ACT;

(2) CALIFORNIA LABOR
CODE;

(3) CALIFORNIA INDUSTRIAL
WELFARE COMMISSION
WAGE ORDERS; and

(4) CALIFORNIA BUSINESS
AND PROFESSIONS CODE
§§17200, *et seq.*

FILED
11 MAR -2 PM 2:05
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY: _____

COLLECTIVE AND CLASS ACTION COMPLAINT

§§17200, *et seq.*

JURY TRIAL DEMANDED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COLLECTIVE AND CLASS ACTION COMPLAINT

1 Plaintiffs Kevin Dwaine Mitchell and Natasha Lytle, on behalf of themselves and
2 all others similarly situated, allege as follows:

3 **NATURE OF THE CASE**

4 1. Defendants Acosta Inc. and Acosta Sales, LLC (collectively "Acosta")
5 employ thousands of persons across the United States and hundreds in California as
6 Merchandisers. Each day Acosta sends its Merchandisers to retail and convenience
7 stores to collect and record information about product placement and inventory. The
8 information collected is then relayed to the manufacturers and wholesalers of those
9 products. Merchandisers also install, set up, maintain, and take down product displays.
10 Acosta does not, however, pay the Merchandisers for all the time that it requires them to
11 work and, in addition, does not reimburse them for their required and employment related
12 use of personal vehicles, internet access, and cell phone service.

13 2. Plaintiffs worked as Merchandisers for Acosta and seek to represent other
14 former and current Acosta Merchandisers in this collective and class action against
15 Acosta alleging that Acosta has engaged in an unlawful pattern and practice of failing to
16 pay minimum wage and overtime pay as required by the Fair Labor Standards Act
17 ("FLSA"), 29 U.S.C. § 201, et seq., and failing to meet the requirements of the California
18 Labor Code. Plaintiffs seek injunctive and declaratory relief, compensation for all
19 uncompensated work, reimbursement for all expenses incurred as required by
20 employment, liquidated and/or other damages as permitted by applicable law, penalties,
21 interest, attorneys' fees, and costs.

22 **JURISDICTION AND VENUE**

23 3. The FLSA authorizes private rights of action to recover damages for
24 violation of the FLSA's wage and hour provisions. 29 U.S.C. § 216(b). This Court has
25 original federal question jurisdiction under 28 § U.S.C. § 1331. This Court has
26 supplemental jurisdiction over the California state law claims because they are so related
27 to this action that they form part of the same case or controversy under Article III of the
28 United States Constitution. Additionally, jurisdiction over Plaintiff's state law claims is

1 based upon the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2)(A), because
2 the aggregated claims of the individual class members exceed the sum value of
3 \$5,000,000, exclusive of interests and costs, and this is a class action in which more than
4 two-thirds of the proposed California Class, on the one hand, and Acosta, on the other,
5 are citizens of different states.

6 4. Venue is proper in this District under 28 U.S.C. § 1391 because Acosta
7 conducts substantial business in this District and a substantial part of the acts and/or
8 omissions giving rise to the claims occurred in this District.

9 PARTIES

10 5. Plaintiff Kevin Dwaine Mitchell is a citizen and resident of San Diego,
11 California. Mr. Mitchell was employed by Acosta as a Merchandiser in San Diego,
12 California from April 2009 through December 2010.

13 6. Plaintiff Natasha Lytle is a citizen and resident of Hesperia, California.
14 Ms. Lytle was employed by Acosta as a Merchandiser in Hesperia, California from
15 August 2008 through January 2011.

16 7. Defendant Acosta Sales, LLC, f/k/a Acosta Sales Co., Inc., d/b/a Acosta
17 Sales and Marketing Company is a Delaware limited liability corporation. Acosta Sales
18 has its corporate headquarters in Jacksonville, Florida. Acosta Sales employs thousands
19 of Merchandisers nationwide. Acosta Sales has California regional offices in Brea,
20 Chula Vista, and Pleasanton, and advertises for Merchandiser positions and employs
21 hundreds of Merchandisers across the state of California.

22 8. Defendant Acosta, Inc. is a Delaware corporation. Acosta Inc. is the
23 governing entity for Acosta Sales and has its corporate headquarters in Jacksonville,
24 Florida. Defendant Acosta Inc. directly or indirectly employs or controls the
25 employment of Merchandisers and therefore conducts business throughout the United
26 States and in the State of California.

27 9. Plaintiffs are informed and believe, and based thereon allege, that at all
28 relevant times Acosta Inc. controlled Acosta Sales and that Acosta Sales acted as the

1 agent of Acosta Inc. Plaintiffs are informed and believe, and based thereon allege, that
2 Acosta Inc. and Acosta Sales carried out a joint scheme, business plan, or policy, and
3 that acts of each are attributable to the other. Acosta Inc.'s control over Acosta Sales
4 exceeds the control normally exercised by parent corporation. Accordingly, Plaintiffs
5 allege that at all relevant times Acosta Inc. and Acosta Sales are or were the joint
6 employers of Plaintiffs and the collection of employees they seek to represent. 29
7 C.F.R. 791.2(b).

8 10. Plaintiffs are informed and believe and thereon allege that each and every of
9 the acts and omissions alleged herein were performed by, and/or attributable to, all
10 Defendants, each acting as agents and/or employees, and/or under the direction and
11 control of each of the other Defendants, and that said acts and failures to act were within
12 the course and scope of said agency, employment and/or direction and control.

13 11. Plaintiffs use the terms "Defendant," "Defendants," and "Acosta" to refer
14 collectively to all Defendants.

15 SUBSTANTIVE ALLEGATIONS

16 GENERAL INFORMATION

17 12. Acosta employs persons as "Merchandisers," which as used herein includes,
18 but is not limited to, "Retail Coverage Merchandisers," "Retail Service Merchandisers"
19 and equivalent positions.

20 13. Merchandisers typically are assigned to visit multiple retail stores, where
21 they use handheld electronic devices or reports to record information, such as which
22 products are placed in which areas of retail shelving and in which quantities.
23 Merchandisers also ensure that the appropriate merchandise is on sale and is displayed
24 properly, which involves checking date codes, rotating seasonal stock, attaching tags
25 properly, and related work. In addition, Merchandisers install, set up, and monitor
26 product displays.

27 14. Acosta paid Plaintiffs \$12.00 per hour from April 2008 through January
28 2011. The federal minimum was \$5.15/hour until July 24, 2007, was \$5.85/hour as of

1 July 24, 2007, was \$6.55/hour as of July 24, 2008, and has been \$7.25/hour at all times
2 since July 24, 2009. The minimum wage in California was \$7.50/hour as of January 1,
3 2007, and has been \$8.00/hour at all times since January 1, 2008.

4 WORK OFF THE CLOCK

5 15. Acosta requires Merchandisers to download information about their daily
6 work assignments and responsibilities from Acosta at the start of each day.
7 Merchandisers are expected and required to download the information at their homes in
8 order to plan their routes and schedules for the day before they depart for their first retail
9 store. Merchandisers are not paid for this time or for the time travelling to their first
10 assignments.

11 16. At the end of the work day, Acosta requires Merchandisers to upload
12 information collected during the day about the shelving and inventory of products to an
13 Acosta server. Merchandisers are expected and required to upload the information at
14 their homes. Uploading the information collected each day to Acosta can take a half hour
15 or longer, depending on how busy the Acosta servers are and how much information is
16 uploaded. The Merchandisers must monitor the upload process closely because the
17 process is often unsuccessful and the Merchandisers must ensure the uploads are
18 completed by a certain time each night. Merchandisers also have to complete paperwork
19 at the end of each day. Merchandisers are not paid for any of this work time.

20 17. Acosta's policy and practice of denying Plaintiffs and the proposed
21 collection and class members straight-time and overtime pay for all hours worked is
22 unlawful. Plaintiffs and the proposed collection and class members are entitled to
23 recover damages for these violations of law.

24 NON-REIMBURSEMENT OF EMPLOYMENT EXPENSES

25 18. Acosta requires Merchandisers to have valid driver's licenses and to use
26 their own vehicles to travel to their assigned retail stores each day. Acosta requires
27 Merchandisers to carry all the equipment and products they need for a job in their own
28 vehicles.

1 19. Acosta maintains a policy that Merchandisers are not reimbursed for their
 2 travel expenses for either the first 20 miles of driving or the last 20 miles of driving each
 3 day. Acosta also has a policy of paying Merchandisers \$0.31 for each mile above 40
 4 miles a day. From 2007 through February 2011 the federal vehicle mileage
 5 reimbursement rate for businesses ranged from \$0.48 through \$0.58. Acosta maintains a
 6 policy and practice of reducing the mileage reimbursement rate to \$0.10 for each mile
 7 when Merchandisers exceed a pre-set threshold for miles driven in a month.

8 20. Acosta requires Merchandisers to use personal equipment and services for
 9 the discharge of their employment duties, but does not have a policy or practice of
 10 reimbursing its employees for their work related expenditures. The necessarily incurred
 11 but unreimbursed expenditures include, but are not limited to: (a) high speed internet
 12 access to download and upload information on a daily basis; (b) scanners and/or fax
 13 machines to transmit and receive hard copy documents to and from Acosta; and (c)
 14 printer cartridges and paper used to print plan-o-grams and other necessary documents;
 15 and (d) cell phone service to make and receive calls from Acosta supervisors and
 16 managers throughout the day.

17 COLLECTIVE AND CLASS ACTION ALLEGATIONS

18 21. Plaintiffs brings the First Count (the FLSA claim) as an "opt-in" collective
 19 action pursuant to 29 U.S.C. § 216(b) on behalf of themselves and a proposed collection
 20 of similarly situated employees defined as:

21 All individuals who are currently employed, or formerly have
 22 been employed, by Acosta as Merchandisers, or equivalent
 23 positions, in the United States within the last three years (the
 24 "FLSA Collection").

25 22. Plaintiffs, individually, and on behalf of other similarly situated employees
 26 defined above, seek relief on a collective basis challenging Acosta's policy and practice
 27 of failing to accurately record all hours worked, and failing to properly pay
 28 Merchandisers for all hours worked, including overtime compensation. The number and

1 identity of other similarly situated persons yet to opt-in and consent to be party-plaintiffs
2 may be determined from the records of Acosta, and potential opt-ins may be easily and
3 quickly notified of the pendency of this action.

4 23. Plaintiffs bring the Second through Sixth Counts (the California state law
5 claim) as an "opt-out" class action pursuant to Federal Rule of Civil Procedure 23. The
6 California Class is initially defined as:

7 All individuals who are currently employed, or formerly have been
8 employed, by Acosta as Merchandisers, or equivalent positions, in
9 California, at any time during the four years prior to the
10 commencement of this lawsuit through the date of class notice (the
"California Class").

11 Excluded from the California Class are anyone employed by counsel for Plaintiff in this
12 action; and any Judge to whom this case is assigned as well as his or her immediate
13 family.

14 24. **Numerosity.** Acosta has employed hundreds of merchandisers in
15 California from 2007 through the present. California Class members are therefore far
16 too numerous to be individually joined in this lawsuit.

17 25. **Existence and Predominance of Common Questions.** Common
18 questions of law and/or fact exist as to the members of the California Class and, in
19 addition, common questions of law and/or fact predominate over questions affecting
20 only individual members of the California Class. The common questions include the
21 following:

22 a. Whether Acosta's policy and practice of requiring Merchandisers to
23 work off-the-clock without compensation violates California labor laws;

24 b. Whether Acosta's policy and practice of failing to reimburse
25 employees for the employment related use of their personal vehicles, high speed internet
26 access, and cell phone service is a violation of Labor Code § 2802;

27 c. Whether Acosta's payroll policies and practices have violated the
28 Labor Code and/or the California Unfair Competition Law, Business and Professions

1 Code §§ 17200, *et seq.* (the “UCL”) by resulting in the provision of wage statements that
2 do not accurately reflect the employee earnings and/or other items listed in Labor Code §
3 226(a);

4 d. Whether Acosta’s policies and practices of requiring Merchandisers to
5 work off-the-clock and of failing to reimburse Merchandisers for the actual work related
6 use of their personal property and services are an unlawful and unfair business act or
7 practice in violation of the UCL.

8 e. Whether Plaintiff and the California Class are entitled to damages and
9 equitable relief, including, but not limited to, restitution and a preliminary and/or
10 permanent injunction, and if so, the proper measure and formulation of such relief.

11 26. **Typicality.** Plaintiffs’ claims are typical of the claims of the California
12 Class. Acosta’s common course of conduct in violation of law as alleged herein has
13 caused Plaintiffs and the proposed California Class to sustain the same or similar
14 injuries and damages. Plaintiffs’ claims are thereby representative of and co-extensive
15 with the claims of the proposed California Class.

16 27. **Adequacy.** Plaintiffs are adequate representatives of the California Class
17 because their interests do not conflict with the interests of the members of the class they
18 seeks to represent. Plaintiffs have retained counsel competent and experienced in
19 complex class action litigation, and Plaintiffs intend to prosecute this action vigorously.
20 Plaintiffs and their counsel will fairly and adequately protect the interests of members
21 of the California Class.

22 28. **Superiority.** The class action is superior to other available means for the
23 fair and efficient adjudication of this dispute. The injury suffered by each member of
24 the California Class, while meaningful on an individual basis, is not of such magnitude
25 as to make the prosecution of individual actions against Acosta economically feasible.
26 Individualized litigation increases the delay and expense to all parties and the court
27 system presented by the legal and factual issues of the case. By contrast, the class
28 action device presents far fewer management difficulties and provides the benefits of

1 single adjudication, economy of scale, and comprehensive supervision by a single court.

2 29. In the alternative, the California Class may be certified because:

3 a. the prosecution of separate actions by the individual members of the
4 California Class would create a risk of inconsistent or varying adjudication with respect
5 to individual members of the California Class which would establish incompatible
6 standards of conduct for Acosta; and

7 b. Acosta has acted or refused to act on grounds generally applicable to
8 the California Class, thereby making appropriate final and injunctive relief with respect
9 to the members of the California Class as a whole.

10 **FIRST CAUSE OF ACTION**

11 **Violations of the Fair Labor Standards Act**

12 **(By the FLSA Collection and Against All Defendants)**

13 31. Plaintiffs, on behalf of themselves and all others similarly situated, reallege
14 as if fully set forth, each and every allegation set forth herein. Plaintiffs' consents to
15 join this action seeking unpaid wages are attached herewith as Exhibit A.

16 32. At all times material herein, Plaintiffs have been entitled to the rights,
17 protections, and benefits provided under the FLSA, 29 U.S.C. §§ 201, *et seq.*

18 33. The FLSA requires, among other things, that employers whose employees
19 are engaged in interstate commerce, engaged in the production of goods for commerce, or
20 employed in an enterprise engaged in commerce or in the production of goods for
21 commerce pay employees the minimum wage for all time worked and overtime pay at
22 their regular rate of pay. 29 U.S.C. §§ 206(a)(1) and 207(a)(1). Acosta is subject to the
23 requirements of the FLSA because it is an enterprise engaged in interstate commerce and
24 its employees are engaged in commerce.

25 34. Acosta violated the FLSA by failing to pay Merchandisers for all time
26 worked, including overtime pay. Acosta has also violated the FLSA by failing to keep
27 required, accurate records of all hours worked by its Merchandisers. 29 U.S.C. § 211(c).

28 35. Plaintiffs and all similarly situated employees are victims of a uniform and

1 company-wide compensation policy. This uniform policy, in violation of the FLSA, has
 2 been applied to all Merchandisers employed by Acosta throughout California and the
 3 United States.

4 36. Plaintiffs and all similarly situated employees are entitled to damages equal
 5 to the mandated pay and overtime premium pay within the three years preceding the
 6 filing of this Complaint, plus periods of equitable tolling, because Acosta acted willfully
 7 and knew or showed reckless disregard of whether their conduct was prohibited by the
 8 FLSA.

9 37. Acosta has acted neither in good faith nor with reasonable grounds to
 10 believe that its actions and omissions were not a violation of the FLSA, and as a result
 11 thereof, Plaintiffs and other similarly situated employees are entitled to recover an award
 12 of liquidated damages in an amount equal to the amount of unpaid overtime pay, and/or
 13 prejudgment interest at the applicable rate. 29 U.S.C. 216(b).

14 38. As a result of the aforesaid violations of the FLSA's overtime pay
 15 provisions, overtime compensation has been unlawfully withheld by Acosta from
 16 Plaintiffs and all similarly situated employees. Accordingly, Acosta is liable for unpaid
 17 wages, together with an amount equal as liquidated damages, attorneys' fees and costs of
 18 this action.

19 **SECOND CAUSE OF ACTION**

20 **Failure to Pay All Straight Time and Overtime Earned for Hours Worked in**

21 **Violation of**

22 **California Labor Code §§ 510, 1194, and 1198; IWC Wage Order 7-2001**

23 **(By the California Class and Against All Defendants)**

24 39. Plaintiffs, on behalf of themselves and all others similarly situated, reallege
 25 as if fully set forth, each and every allegation set forth herein.

26 40. Plaintiffs and the proposed California Class have been required by Acosta to
 27 work off-the-clock without compensation for the work they performed, including, but not
 28 limited to, the time they spend at home uploading and downloading information required

1 by Acosta and time they spend traveling to, among, and from retail sites. This time is
 2 compensable work time and Acosta is required by law to pay the Merchandisers for this
 3 time. By failing to properly compensate Merchandisers for all hours worked, Acosta has
 4 violated IWC Wage Order 2001-7 (8 Cal. Code Regs. § 11070).

5 41. Acosta has failed to pay overtime wages to Merchandisers for work in
 6 excess of eight hours in a day and 40 hours in a week. Acosta has violated Labor Code §
 7 510(a) and IWC Wage Order 2001-7.

8 42. Pursuant to Labor Code §§ 1194 and 1198, Plaintiffs and the proposed
 9 California Class are entitled to recover in a civil action the unpaid balance of the full
 10 amount of straight time and overtime compensation owed to them, including interest
 11 thereon, plus reasonable attorney's fees and costs of suit.

12 **THIRD CAUSE OF ACTION**

13 **Failure to Reimburse Employees for Expenses Required for Employment in** 14 **Violation of**

15 **California Labor Code § 2802 and IWC Wage Order 2001-7(9)(B)**

16 **(By the California Class and Against All Defendants)**

17 43. Plaintiffs re-allege and incorporate the foregoing paragraphs as though fully
 18 set forth herein.

19 44. Acosta has required Plaintiffs and the proposed California Class to obtain or
 20 maintain vehicles, high speed internet access, and cell phone service because Acosta
 21 maintains that those tools and services are necessary for Merchandisers to use to
 22 discharge their employment duties.

23 45. Acosta has policies and practice of failing to reimburse Merchandisers for
 24 the business expenses related to vehicle use, high speed internet access, and cell phone
 25 service that the Merchandisers actually and necessarily incur as part of their employment.
 26 This is a violation of Labor Code § 2802, IWC Wage Order 7-2001(9)(B), and the UCL.

27 46. Pursuant to state law, Plaintiffs and the proposed California Class are
 28 entitled to recover in a civil action the unpaid balance of their unreimbursed business

1 expenses, including interest thereon, plus reasonable attorney's fees and costs of suit.

2 **FOURTH CAUSE OF ACTION**

3 **Failure to Provide Itemized Wage Statements**

4 **in Violation of California Labor Code § 226 and IWC Wage Order 2001-7**

5 **(By the California Class and Against All Defendants)**

6 47. Plaintiffs re-allege and incorporate the foregoing paragraphs as though fully
7 set forth herein.

8 48. Acosta has failed and continues to fail to provide timely, accurate itemized
9 wage statements to Plaintiffs and members of the proposed California Class in
10 accordance with Labor Code § 226(a) and IWC Wage Order 2001-7 (8 Cal. Code Regs. §
11 11070). The wage statements Acosta provide their employees, including Plaintiffs and
12 proposed California Class members, do not accurately reflect the actual hours worked
13 and wages earned.

14 49. Acosta's failure to provide timely, accurate itemized wage statements to
15 Plaintiffs and members of the proposed California Class in accordance with the Labor
16 Code and the applicable Wage Orders has been knowing and intentional. Accordingly,
17 Acosta is liable for damages and penalties under Labor Code § 226(e).

18 **FIFTH CAUSE OF ACTION**

19 **Waiting Time Penalties**

20 **Under California Labor Code §§ 201, 202 and 203**

21 **(By the California Class and Against All Defendants)**

22 50. Plaintiffs re-allege and incorporate the foregoing paragraphs as though fully
23 set forth herein.

24 51. Labor Code § 201(a) requires an employer who discharges an employee to
25 pay compensation due and owing to said employee immediately upon discharge. Labor
26 Code § 202(a) requires an employer to pay compensation due and owing to said
27 employee within seventy-two (72) hours of that employee's termination of employment
28 by resignation. Labor Code § 203 provides that if an employer willfully fails to pay

1 compensation promptly upon discharge or resignation, as required under §§ 201 and 202,
 2 then the employer is liable for waiting time penalties in the form of continued
 3 compensation for up to thirty (30) work days.

4 52. Plaintiffs and the members of the proposed California Class are entitled to
 5 unpaid compensation for all hours worked but for which to date they have not received
 6 compensation.

7 53. Plaintiffs and certain members of the proposed California Class have left the
 8 employ of Acosta but have not been paid full compensation for all hours worked.

9 54. Acosta has willfully failed and refused, and continue to willfully fail and
 10 refuse, to timely pay compensation and wages to the Plaintiffs and members of the
 11 proposed California Class whose employment has terminated, as required by Labor Code
 12 §§ 201 and 202. As a direct and proximate result, Acosta is liable to Plaintiffs and
 13 proposed California Class Members for up to thirty (30) days of waiting time penalties
 14 pursuant to Labor Code § 203, together with interest thereon.

15 **SIXTH CAUSE OF ACTION**

16 **Unlawful and Unfair Business Practices in Violation of California Business and** 17 **Professions Code Section §§ 17200, *et seq.***

18 **(By the California Class and Against All Defendants)**

19 55. Plaintiffs re-allege and incorporate the foregoing paragraphs as though fully
 20 set forth herein.

21 56. California's Unfair Competition Law, Business and Profession Code §§
 22 17200 *et seq.*, prohibits unfair competition in the form of any unlawful and unfair
 23 business act or practice.

24 57. California Business and Professions Code § 17204 allows "any person who
 25 has suffered injury in fact and has lost money or property as a result of such unfair
 26 competition" to prosecute a civil action for violation of the UCL.

27 58. Labor Code § 90.5(a) states it is the public policy of California to vigorously
 28 enforce minimum labor standards in order to ensure employees are not required to work

1 under substandard and unlawful conditions, and to protect employers who comply with
2 the law from those who attempt to gain competitive advantage at the expense of their
3 workers by failing to comply with minimum labor standards.

4 59. Beginning at an exact date unknown to Plaintiffs, but at least since the date
5 four years prior to the filing of this suit, Acosta have committed acts of unfair
6 competition as defined by the UCL, by engaging in the unlawful and unfair business
7 practices and acts described in this Complaint, including, but not limited to:

8 a. violations of the Fair Labor Standards Act, 29 U.S.C. § 207,
9 pertaining to payment of wages and overtime compensation;

10 b. violations of Labor Code §§ 510 and 1194, and Wage Order 7-2001
11 pertaining to payment of wages and overtime compensation;

12 c. violations of Labor Code § 2802 pertaining to failure to reimburse
13 employees for business expenses;

14 d. violations of Labor Code § 226 pertaining to the provision of accurate
15 wage statements; and

16 e. violations of Labor Code §§ 201-202 pertaining to the payment of
17 compensation due and owing to employees immediately upon discharge.

18 60. The violations of these laws and regulations, as well as of the fundamental
19 California public policies protecting workers, serve as unlawful predicate acts and
20 practices for purposes of the UCL.

21 61. The acts and practices described above constitute unfair and unlawful
22 business practices, and unfair competition, within the meaning of the UCL. Among other
23 things, Acosta's practices have required Plaintiffs and other similarly situated workers to
24 work for Acosta's benefit without the legally required compensation and reimbursement,
25 enabling Acosta to gain an unfair competitive advantage over law-abiding employers and
26 competitors.

27 62. The Court may order injunctive or declaratory to enforce a penalty,
28 forfeiture, or penal law in a case of unfair competition. Business and Professions Code

1 §§ 17202 and 17203.

2 63. The Court may order monetary relief in the form of restitution of wages and
3 the reimbursement of expenses. Business and Profession Code § 17203.

4 64. Attorneys' fees are appropriate pursuant to Code of Civil Procedure §
5 1021.5 and otherwise.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs prays for relief as follows:

8 1. For an order certifying that the First Count of this Complaint may be
9 maintained as a collective action pursuant to 29 U.S.C. § 216(b) and that prompt notice of
10 this action be issued to potential members of the opt-in FLSA Collection, apprising them
11 of the pendency of this action, and permitting them to assert timely FLSA claims;

12 2. For an order certifying that the Second through Sixth Counts of this
13 Complaint be maintained as a class action pursuant to Federal Rule of Civil Procedure 23
14 on behalf of a class of Acosta Merchandisers employed in the state of California within
15 the last four and that notice of the pendency of this action be provided to members of the
16 California Class;

17 3. For an order designating Plaintiffs as class representatives for both the FLSA
18 and state law claims and Plaintiffs' attorneys as Counsel for both the FLSA Collection
19 and the California Class;

20 4. For an order awarding Plaintiffs, the FLSA Collection, and the California
21 Class compensatory damages and statutory damages (including liquidated damages on
22 the FLSA claim), including lost wages, earnings, and other employee benefits and all
23 other sums of money owed to Plaintiffs and members of the FLSA Collection and the
24 California Class, together with interest on these amounts;

25 5. For an order directing Acosta to identify, locate and restore to all current and
26 former employees the restitution they are due for lost wages, earnings, and other
27 employee benefits and all other sums of money, together with interest on these amounts;

28 6. For preliminary, permanent and mandatory injunctive relief prohibiting

1 Acosta, its officers, agents and all those acting in concert with them, from committing the
2 violations of law herein alleged in the future;

3 7. For a declaratory judgment that Acosta has violated the FLSA and California
4 Labor Law and public policy as alleged herein;

5 8. For an order imposing all statutory and/or civil penalties provided by law,
6 including but not limited to, penalties under Labor Code §§ 203 and 226(e), together with
7 interest on these amounts;

8 9. For exemplary and punitive damages, as appropriate and available under
9 each cause of action, pursuant to Civil Code § 3294.

10 10. For pre- and post-judgment interest;


11 11. For an award of reasonable attorneys' fees as provided by the FLSA,
12 California Labor Code §§ 226(e) and 1194; California Code of Civil Procedure § 1021.5;
13 and/or other applicable law;

14 12. For all costs of suit; and

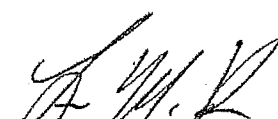
15 13. For such other and further relief as this Court deems just and proper.

16
17 DATED: March 2, 2011

Respectfully submitted,

18 By: 
19 Eric H. Gibbs

20 Philip B. Obbard
21 Matthew B. George
22 **GIRARD GIBBS LLP**
23 601 California Street, Suite 1400
24 San Francisco, California 94104
25 Telephone: (415) 981-4800
26 Facsimile: (415) 981-4846

27 By: 
28 Lisa M. Bowman

1 Todd M. Schneider
2 Lisa M. Bowman
3 Joshua G. Konecky
4 **SCHNEIDER WALLACE COTTRELL**
5 **BRAYTON KONECKY LLP**
6 180 Montgomery Street, Suite 2000
7 San Francisco, CA 94104
8 Telephone: (415) 421-7100
9 Facsimile: (415) 421-7105
10 TTY: (415) 421-1655

11 Peter Schneider, *pro hac vice*
12 pschneider@gsnlaw.com
13 Keith Grady, *pro hac vice*
14 kgrady@gsnlaw.com
15 **GRADY SCHNEIDER, LLP**
16 801 Congress, Suite 400
17 Houston, TX 77002
18 Telephone: (713) 228-2200
19 Facsimile: (713) 228-2210

20 Attorneys for Individual and Representative
21 Plaintiffs Kevin Dwaine Mitchell and Natasha
22 Lytle
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge Mariana P. Pfaelzer and the assigned discovery Magistrate Judge is Oswald Parada.

The case number on all documents filed with the Court should read as follows:

CV11- 1796 MRP (OPx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

The United States District Judge assigned to this case will review all filed discovery motions and thereafter, on a case-by-case or motion-by-motion basis, may refer discovery related motions to the Magistrate Judge for hearing and determination

=====

NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

☒ **Western Division**
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

☐ **Southern Division**
411 West Fourth St., Rm. 1-053
Santa Ana, CA 92701-4516

☐ **Eastern Division**
3470 Twelfth St., Rm. 134
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Central District of California

KEVIN DWAIN MITCHELL and NATASHA LYTLE,
on behalf of themselves and all others similarly situated,

Plaintiff

v.

Civil Action No.

CV11-01796 MRP(OPX)

ACOSTA SALES, LLC, f/k/a ACOSTA SALES
CO. INC. d/b/a ACOSTA SALES AND MARKETING
COMPANY, A Delaware limited liability corporation,
ACOSTA, INC., A Delaware corporation, and DOES 1-10.
Defendants.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Acosta, Inc. & Acosta Sales, LLC
c/o Corporation Service Company
2711 Centerville Road, Suite 400
Wilmington, DE 19808

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Eric H. Gibbs
GIRARD GIBBS LLP
601 California Street, 14th Floor
San Francisco, CA 94108

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

MAR - 2 2011

Date: _____

CLERK OF COURT

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

I (a) PLAINTIFFS (Check box if you are representing yourself <input type="checkbox"/> KEVIN DWAIN MITCHELL and NATASHA LYTLE, on behalf of themselves and all others similarly situated	DEFENDANTS ACOSTA SALES, LLC, f/k/a ACOSTA SALES CO., INC. d/b/a ACOSTA SALES AND MARKETING COMPANY, A Delaware limited liability corporation, ACOSTA, INC., a Delaware corporation, and DOES 1-50
(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.) Eric H. Gibbs - GIRARD GIBBS LLP 601 California Street, 14th Floor, San Francisco, CA 94108 (415) 981-4800	Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an X in one box only.) <input type="checkbox"/> 1 U.S. Government Plaintiff <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.) <table style="width:100%; border: none;"> <tr> <td style="width:33%; border: none;">Citizen of This State</td> <td style="width:10%; border: none; text-align: center;">PTF DEF</td> <td style="width:33%; border: none;"> <input type="checkbox"/> 1 <input type="checkbox"/> 1 Incorporated or Principal Place of Business in this State </td> <td style="width:10%; border: none; text-align: center;">PTF DEF</td> <td style="width:14%; border: none;"> <input type="checkbox"/> 4 <input type="checkbox"/> 4 </td> </tr> <tr> <td style="border: none;">Citizen of Another State</td> <td style="border: none; text-align: center;"> <input type="checkbox"/> 2 <input type="checkbox"/> 2 </td> <td style="border: none;">Incorporated and Principal Place of Business in Another State</td> <td style="border: none; text-align: center;"> <input type="checkbox"/> 5 <input type="checkbox"/> 5 </td> <td style="border: none;"></td> </tr> <tr> <td style="border: none;">Citizen or Subject of a Foreign Country</td> <td style="border: none; text-align: center;"> <input type="checkbox"/> 3 <input type="checkbox"/> 3 </td> <td style="border: none;">Foreign Nation</td> <td style="border: none; text-align: center;"> <input type="checkbox"/> 6 <input type="checkbox"/> 6 </td> <td style="border: none;"></td> </tr> </table>	Citizen of This State	PTF DEF	<input type="checkbox"/> 1 <input type="checkbox"/> 1 Incorporated or Principal Place of Business in this State	PTF DEF	<input type="checkbox"/> 4 <input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5 <input type="checkbox"/> 5		Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6	
Citizen of This State	PTF DEF	<input type="checkbox"/> 1 <input type="checkbox"/> 1 Incorporated or Principal Place of Business in this State	PTF DEF	<input type="checkbox"/> 4 <input type="checkbox"/> 4												
Citizen of Another State	<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5 <input type="checkbox"/> 5													
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6													

IV. ORIGIN (Place an X in one box only.)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify):	<input type="checkbox"/> 6 Multi-District Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judge
---	---	--	---	---	--	---

V. REQUESTED IN COMPLAINT: JURY DEMAND: ☒ Yes ☐ No (Check 'Yes' only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: ☒ Yes ☐ No **MONEY DEMANDED IN COMPLAINT:** \$ over \$5 million

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
 Wage and hour claims under FLSA, 26 U.S.C. 216(b), and California Labor Law

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Act <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Info. Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes	CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	TORTS PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Fed. Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus-Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	TORTS PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 American with Disabilities - Employment <input type="checkbox"/> 446 American with Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 Habeas Corpus General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus/Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition FORFEITURE/PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	LABOR <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609
---	--	--	---	---	--

FOR OFFICE USE ONLY: Case Number: **CV11-01796**

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? ☒ No ☐ Yes
 If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? ☒ No ☐ Yes
 If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or
☐ B. Call for determination of the same or substantially related or similar questions of law and fact; or
☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or
☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

- (a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.
☐ Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
San Bernardino County	San Diego County

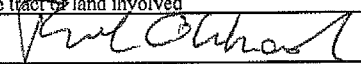
- (b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.
☐ Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	Florida

- (c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose.
Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
San Bernardino County	San Diego County

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties
Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER):  Date 03/02/2011

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))